Supreme Court, U.S.
FILED

No. 101025

FEB 10 2011
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In the Supreme Court of the United States

Helmut Horst Mauer,

Petitioner,

v.

State of Minnesota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Upon Petitioner's direct appeal of his conviction for possession of child pornography, the Minnesota Supreme Court construed the child pornography statute narrowly, adding the scienter element of recklessness. The court did not order a new trial but remanded the case to the trial court to determine whether Petitioner's conviction could be sustained under the newly adopted scienter requirement, based upon the record of the earlier trial. The question presented is whether the procedure employed by the Minnesota Supreme Court denied Petitioner due process of law.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A-1 and is reported at 625 F.3rd 489 (8th Cir. 2010).

The order of the United States District Court appears at Appendix A-11 and is unpublished.

The report and recommendation of the United States magistrate judge appears at Appendix A-13 and is unpublished.

The opinion of the Minnesota Supreme Court appears at Appendix A-41 and is reported at 741 N.W.2d 107 (Minn. 2007).

The opinion of the Minnesota Court of Appeals appears at Appendix A-59 and is reported at 726 N.W.2d 810 (Minn. App. 2007).

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 17, 2010.

No petition for rehearing was timely filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254 (d).

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Minn. Stat. § 617.247.

> **Subd. 4. Possession prohibited.** (a) A person who possesses a pornographic work or a computer disk or a computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than five years and a fine of not more than $5,000 for a first offense and for not more than ten years and a fine of not more than $10,000 for a second or subsequent offense.

STATEMENT OF THE CASE

In April of 2002 postal inspectors in Florida received information that an individual identified as Angel Mariscal was distributing child pornography from a location in Miami. An investigation revealed that Mariscal was traveling to Ecuador and Cuba and producing child pornography in those countries. The material was then brought into the United States and distributed to customers through a business known as "Cultural Research Team" or CRT. Mariscal was arrested in Florida and child pornography was seized from his hotel room and a storage facility. Among the items seized was a customer list. The agents assumed control of the business and sent out catalogues to past customers.

Petitioner was one of the persons who received a catalogue in the mail. In response to the solicitation Petitioner ordered four CD's. These CD's were described in the catalogue as featuring children

between the ages of 9 to 14 engaged in acts of sexual conduct.

On May 23, 2003, postal agents delivered the package containing the four CD's to Petitioner and he signed for it. Shortly thereafter, the agents executed a search warrant at Petitioner's place of business and recovered the four CD's under his desk. The package was opened but Petitioner had not actually viewed any of the CD's.

Petitioner was charged with four counts of possession of child pornography under Minn. Stat. 617.247, subd. 4(a), which prohibits the possession of a pornographic work, or computer disk containing a pornographic work, knowing or with reason to know its contents and character.

The case was tried to the court without a jury. At the trial the Petitioner stipulated that the CD's confiscated from his office contained child pornography but he claimed that he was not aware that the actors appearing on the CD's were actually minors. The trial court found that Petitioner had "reason to know" that the actors appearing in the videos were minor children. Accordingly, the court found the Petitioner guilty of possession of child pornography and entered judgment of conviction.

Petitioner appealed his conviction and also sought post conviction relief on the grounds that the child pornography statute violated the First Amendment for lack of a sufficient scienter requirement. The district court denied Petitioner's petition for post conviction relief.

The Minnesota Court of Appeals affirmed Petitioner's conviction and the denial of post

conviction relief. The court interpreted the statute's requirement that the defendant possess child pornography "knowing or with reason to know its content and character" to mean that the possessor of child pornography must be "in some manner aware" that the performers are minors. State v. Mauer, 726 N.W. 2d 810, 814 (Minn. App. 2007). The court also held that the district court's findings were sufficient to satisfy the new standard.

Petitioner sought review by the Minnesota Supreme Court, citing as issues the constitutionality of the statute and also the failure of the appellate court to remand the case for a new trial. The supreme court granted review on the sole issue of the constitutionality of the statute. The supreme court upheld the constitutionality of Minn. Stat. 617.247, Subd. 4(a), but announced a narrowing construction of the statute. The court construed the statute to mean that a defendant charged with possession of child pornography must be "subjectively aware of a substantial and unjustifiable risk that the work involves a minor." State v. Mauer, 741 N.W. 2d 107, 115 (Minn. 2007). Because it was unclear whether the district court's findings of fact and conclusions of law would support Petitioner's conviction under the "reason to know" standard, as thus interpreted, the supreme court remanded the case to the district court to reconsider its findings of fact and conclusions of law, on the existing record, applying the legal standard announced in the opinion. Id. at 116. The supreme court did not vacate Petitioner's conviction or order a new trial.

On remand the trial judge reviewed the record and issued additional findings. Based on the record, the trial judge concluded that Petitioner "was

subjectively aware of a substantial and unjustifiable risk that the pornographic works he ordered in this case involved actual minors." Accordingly, the trial court upheld Petitioner's conviction under Minn. Stat. § 617.247, Subd. 4(a).

Petitioner then filed for habeas relief under 28 U.S.C. § 2254, arguing that his conviction was contrary to clearly established federal law and a violation of due process under Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Ashton v. Kentucky, 384 U.S. 195 (1966); and Osborne v. Ohio, 495 U.S. 103 (1990). He argued that he was denied due process because the Minnesota Supreme Court failed to vacate his conviction and order a new trial after narrowly construing the statute under which he was convicted, and instead remanded the case to the trial judge to consider whether his conviction should be sustained under the new construction of the statute, based on the record of the previous trial.

The case was referred to United States Magistrate Judge Jeanne Graham for consideration. The magistrate judge concluded that the supreme court's decision to remand the case to the trial court for reconsideration of its findings was not "contrary to" this Court's decisions in Shuttlesworth and Osborne because neither case held that conducting a new trial was "the only way to ensure that a defendant is guilty" under an appellate court's later construction of the applicable statute. She further held that the Minnesota Supreme Court "effectively cured the defect identified in Shuttlesworth" by remanding the case to the trial court for the purpose of determining whether the state had proved each of the elements of section 617.247, Subd. 4(a) as the

statute was construed by the supreme court. (A-32). The magistrate judge also rejected Petitioner's argument that he was denied due process because at the time of his original trial he had no notice that the subjective awareness standard would govern his case.

The United States District Court adopted the report and recommendation of the magistrate judge and denied the petition for habeas corpus relief. The district court did, however, grant a certificate of appealability.

Petitioner then appealed to the Eighth Circuit Court of Appeals, citing Shuttlesworth v. City of Birmingham, Ashton v. Kentucky, and Osborne v. Ohio. He argued that when a state appellate court construes a criminal statute narrowly to save its constitutionality, and it is unclear whether the defendant was convicted under the statute as properly construed rather than as originally written, the conviction must be reversed and a new trial afforded.

The Court of Appeals held that the state supreme court's remand of Petitioner's case to the trial court to review the record and apply the newly adopted scienter requirement, without a new trial, did not violate due process. Because the Court of Appeals concluded that Petitioner's due process rights were not violated by the procedure employed by the state supreme court or his conviction on remand, the court affirmed the judgment of the district court denying the petition for habeas corpus relief. Mauer v. Minnesota, 625 F. 3rd 489, 494 (8th Cir. 2010).

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. The Remand Order of the Minnesota Supreme Court Was Contrary to the Relevant Decisions of This Court.

This Court has held that, where a state appeals court has issued a narrowing construction of a state criminal statute in order to save its constitutionality and the defendant was tried and convicted under the original statute without the narrowing construction, the defendant's conviction must be set aside, since it is not clear that the defendant was convicted under the proper standard. Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Ashton v. Kentucky, 384 U.S. 195 (1966); Osborne v. Ohio, 495 U.S. 103 (1990). The rule was most clearly stated in Ashton v. Kentucky, where this Court stated:

> [W]here an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act.

Id. at 198.

The remand order of the Minnesota Supreme Court in this case was directly contrary to this Court's decisions in Shuttlesworth and Ashton. The Minnesota Supreme Court construed the Child Pornography Act narrowly, limiting its application to a possessor of child pornography, "where the possessor is subjectively aware of a substantial and unjustifiable risk that the work involves a minor." State v. Mauer, 741 N.W. 2d at 115. Petitioner had been convicted under the statute as originally written and not as it was subsequently construed. The Minnesota Supreme Court stated that it could not be certain that the trial court's findings of fact and conclusions of law would support Petitioner's conviction under the court's narrowing construction of "reason to know." State v. Mauer, 741 N.W. 2d at 116.

Because the Petitioner had been tried and convicted under the original statute as written, and because the state supreme court could not be certain that the trial court's findings of fact and conclusions of law would support Petitioner's conviction under the proper construction of the statute, this Court's holdings in Shuttlesworth and Ashton required that Petitioner's conviction be set aside. Nevertheless, the Minnesota Supreme Court did not vacate Petitioner's conviction. Instead the court remanded the case to the trial court to reconsider its findings of fact and conclusions of law, applying the new standard announced in the opinion.

The federal district court was of the opinion that the Minnesota Supreme Court's remand effectively cured the defect identified in Shuttlesworth. But the district court's conclusion

that the constitutional defect could be cured by remanding the case to the trial court for reconsideration on the record is contrary to this Court's statement in Ashton that "the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under an unconstitutional construction of the Act." Id. at 198. Furthermore, the remand to the trial court offended the most basic notions of due process, because the Petitioner had no notice at the time of his trial of the revised element of scienter, and had no opportunity to prepare a defense with that test in mind.[1]

B. This Case Involves the Denial of Fundamental Rights of Due Process.

The order of the Minnesota Supreme Court remanding the case to the trial court for reconsideration on the record violated Petitioner's right to due process because it deprived him of notice of the specific charge against him and the opportunity to defend against it. The Minnesota Supreme Court, by its narrowing construction of the statute, added the element of recklessness to the definition of the offense. The supreme court then remanded the case to the trial court to review the record and determine whether the element of recklessness had been proved at the trial. The defect

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[1] In Osborne v. Ohio, 495 U.S. 103 (1990), Justice Brennan pointed out a similar violation of due process: "[Appellant] maintains that his due process rights were violated because the Ohio Supreme Court affirmed his conviction after adding the elements of 'lewd exhibition' and 'graphic focus' on appeal, despite the fact that appellant had had no reason to design a defense strategy or introduce evidence with those tests in mind." Id. at 146, n. 20 (BRENNAN, J. dissenting).

inherent in this procedure was that, at the time of his trial, Petitioner had no notice that recklessness was an essential element of the charge, and no opportunity to offer a defense to that element of the charge.

The right to notice of the specific charge, and the chance to be heard on the issues raised by the charge, are fundamental under our Constitution. Cole v. Arkansas, 333 U.S. 196 (1948); *Cf.* Henderson v. Morgan, 426 U.S. 637, 645 (1976) ("A plea could not be voluntary...unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.' "). In this case, having proceeded through the trial on a flawed understanding of what the State was required to prove on the issue of scienter, Petitioner learned the true nature of the charge only after the Minnesota Supreme Court issued its interpretation of the statute. The information came too late for Petitioner to exercise his constitutional right to a jury trial or to mount a proper defense. And it came too late to influence his examination of the State's witnesses who provided circumstantial evidence as to Petitioner's knowledge.

Furthermore, a criminal defendant's waiver of constitutional rights must be knowing, intelligent and voluntary, and made with sufficient awareness of the relevant circumstances and likely consequences. McCarthy v. United States, 394 U.S. 459, 466 (1969). Petitioner's understanding of the charge at the time of his decision to waive a jury trial was fundamentally flawed. Such a waiver is not constitutionally valid where neither Petitioner, nor

his counsel, nor the trial court correctly understood an essential element of the crime. *Cf.* Bousley v. United States, 523 U.S. 614, 618 (1998). Moreover, the state supreme court altered the State's burden of proof by requiring a subjective standard of scienter. This heightened requirement made it more difficult for the State to convict a defendant of possession of child pornography. Such a change would reasonably have affected Petitioner's decision on whether to waive a jury trial, since the heightened standard of scienter would necessarily increase the chance of acquittal by a jury of twelve persons.

The state supreme court's interpretation of Minn. Stat. 617.247, Subd. 4(a) was a substantial departure from the literal language of the statute that the parties and the court relied upon at Petitioner's trial. The scienter requirement that the supreme court announced requires the State to prove that a defendant was "subjectively aware of a substantial and unjustifiable risk that the work involves a minor." Under the court's interpretation of the statute, if a defendant was not subjectively aware of a substantial and unjustifiable risk that the work involved a minor, even though he should have been aware of it, he cannot be convicted of possession of child pornography.

Although the state supreme court defined the scienter requirement of Minn. Stat. 617.247, Subd. 4(a) only at the time of Petitioner's appeal, and adopted a definition that was quite different from the literal language of the statute, the court remanded the case for additional findings based on the record which was made at a time when the Petitioner, the prosecutor, and the trial court believed that a lesser

degree of scienter was required. When the record was developed, Petitioner had no notice that the scienter element required proof that he was subjectively aware of a substantial and unjustifiable risk that the work involved a minor. Accordingly he had no opportunity to defend against that element of the charge.

The scope of the supreme court's remand violated Petitioner's most fundamental rights to notice of the charge and the opportunity to be heard on the issues raised by that charge. As this Court stated in Cole v. Arkansas, 333 U.S. 196 (1948):

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

Id. at 201.

C. The Decision of the Court of Appeals Is Incorrect.

The Court of Appeals erroneously held that the procedure followed by the state supreme court was not contrary to this Court's precedents in Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) and Ashton v. Kentucky, 384 U.S. 195 (1966). The court's decision was based upon its conclusion that Shuttlesworth and Ashton are not "materially indistinguishable" from Petitioner's case. Under Williams v. Taylor, 529 U.S. 362, 406 (2000), a state

court decision is contrary to clearly established Supreme Court precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from the Supreme Court's precedent.

In Shuttlesworth v. City of Birmingham, *supra*, the defendant was convicted under a Birmingham city ordinance which made it an offense for any person to stand or loiter upon any street or sidewalk after having been requested by a police officer to move on. The ordinance was apparently unconstitutional because of overbreadth. The Alabama Court of Appeals, however, construed the ordinance narrowly, holding that the ordinance applied only to a person who stands, loiters or walks on a street or sidewalk so as to obstruct free passage. As so construed, the ordinance was not unconstitutional. The problem, of course, was that the narrowing construction of the ordinance came after the defendant's trial and conviction. The trial court made no findings of fact and rendered no opinion. Because this Court was unable to say that the Alabama courts did not judge the petitioner by an unconstitutional construction of the ordinance, the Court held that the petitioner's conviction under the ordinance could not stand. Id. at 92.

The Court of Appeals attempted to distinguish Shuttlesworth from Petitioner's case on the basis that in Shuttlesworth the Alabama trial court made no findings of fact and rendered no opinion, whereas in Petitioner's case the trial judge made detailed findings of fact and conclusions of law. However, this distinction is completely immaterial to the issue

under consideration. Although in Petitioner's case the trial judge issued findings of fact and conclusions of law, those findings were insufficient to support Petitioner's conviction under the newly adopted construction of the statute. The state supreme court acknowledged that the findings were insufficient. State v. Mauer, 741 N.W. 2d 107, 116. Thus, from a logical point of view, the absence of findings in Shuttlesworth and the insufficient findings in Petitioner's case were exactly equivalent. In either case, the appellate court would be unable to say that the trial court did not judge the petitioner by an unconstitutional construction of the statute. *See* Shuttlesworth, 382 U.S. at 92.

The Court of Appeals also suggested that in Shuttlesworth there may have been no record of the proceedings in the trial court. In its opinion the court stated: "There is no indication in the Court's discussion that any evidence had been received or recorded in the Alabama court." (A-8). The problem with this argument is that it is completely false. This Court's opinion in Shuttlesworth is replete with references to and quotations from the record. *See* Shuttlesworth v. City of Birmingham, 382 U.S. at 94.[2]

The Court of Appeals also erroneously distinguished Ashton v. Kentucky, *supra*, from Petitioner's case. In Ashton the defendant had been convicted of violating a vague Kentucky law which was later narrowed on appeal by the Kentucky appellate court. Following Shuttlesworth, this Court reversed the defendant's conviction because "the trial

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[2] In fact Justice Douglas attached an appendix to his concurring opinion containing a lengthy excerpt from the trial testimony. Shuttlesworth v. City of Birmingham, 382 U.S. at 96.

took place under the unconstitutional construction of the Act." Id. at 198. The Court of Appeals attempted to distinguish Ashton on the ground that, in Ashton, the defendant was convicted in a jury trial, whereas in the present case the Petitioner was convicted following a court trial. But the Court of Appeals' attempt to distinguish Ashton on this basis is clearly insupportable, because in Ashton this Court explicitly relied on its earlier decision in Shuttlesworth v. City of Birmingham, a case where the defendant was convicted in a court trial. Ashton, *supra*, at 198. Obviously, this Court's holding in Ashton cannot be limited to cases involving jury trials, when the decision was explicitly based on a precedent established in a case decided without a jury.

The fact of the matter is that, by any reasonable interpretation, the procedure followed by the state supreme court in Petitioner's case was contrary to this Court's precedents in Shuttlesworth and Ashton v. Kentucky.

Finally, the Court of Appeals asserted that Petitioner could not point to any support in the record to show that he would have presented any other evidence or used a different strategy had he been aware of the subsequent developments at the time of his trial. (A-10). Apparently, the Court of Appeals assumed that it was incumbent upon the Petitioner to show that he would have defended the case differently had he been made aware of the correct interpretation of the statute. But that assumption has no support in the relevant decisions of this Court. Neither Shuttlesworth nor Ashton contain any suggestion that a petitioner is required to show in what way he would have defended the case

differently had he been made aware of the correct elements of the offense.[3] Furthermore, the court's assumption ignored the fact that the Petitioner was deprived of the right to notice of the specific charge and the chance to be heard on the issues raised by that charge. In cases where the defendant has been denied fair notice of the charge and the chance to be heard, this Court has consistently responded by vacating the defendant's conviction, nor has the Court required any showing by the defendant that he would have defended the case differently if he had had proper notice. *See* Cole v. Arkansas, 333 U.S. 196 (1948), and Dunn v. United States, 442 U.S. 100 (1979).

In summary, the Court of Appeals erred in distinguishing Shuttlesworth and Ashton v. Kentucky from Petitioner's case, and erred in concluding that the procedure followed by the Minnesota Supreme Court did not violate Petitioner's right to due process.

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[3] Nor was such a showing required in Osborne v. Ohio, 495 U.S. 103 (1990). In Osborne the defendant's conviction was reversed even though, as this Court observed, "there is no doubt whatsoever that Osborne's conduct is proscribed by the terms of the child pornography statute involved here." Id. at 122.

CONCLUSION

For the reasons stated herein, Petitioner respectfully prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX INDEX

Opinion of the U.S. Court of Appeals for the Eighth Circuit, filed November 17, 2010 ..... A-1

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-3623

Helmut Horst Mauer,

Petitioner – Appellant,

v. Appeal from the United States District Court for the District of Minnesota.

State of Minnesota,

Respondent – Appellee.

Submitted: October 19, 2010
Filed: November 17, 2010

Before MURPHY, BEAM, and BENTON, Circuit Judges.

MURPHY, Circuit Judge.

Helmut Horst Mauer brought this action under 28 U.S.C. § 2254 alleging that his due process rights were violated by his state conviction for possession of child pornography. The federal district court[1] denied relief but granted him a certificate of appealability on the issue of whether the Minnesota Supreme Court violated his due process rights by remanding his case to the trial court without vacating his conviction or granting him a new trial. In response to the certified question Mauer urges that several decisions of the United States Supreme Court support his position

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[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

and entitle him to the relief he seeks. We affirm.

I.

Mauer received a mail solicitation in April 2003 to purchase videos said to depict girls, aged from nine to fourteen, engaging in various sex acts. The solicitation purported to be from the Cultural Research Team (CRT), from which Mauer had ordered videos in 1998. In fact it was from government agents who had taken over CRT and were using its mailing list in a sting operation to target purchasers of child pornography. Mauer ordered four video CDs advertised in the solicitation for $515. He also requested more information about a "write your own script" video described as showing a thirteen year old girl fulfilling the subscriber's "fantasy with her." In May, a package containing the four CDs was delivered to Mauer at his business. He signed for it, and minutes later a postal inspector entered and found the package already opened. The inspector confiscated four videos, three of which showed actors clearly under the age of majority who were engaging in sex acts.

In August 2004 Mauer was charged in Hennepin County District Court with violation of Minn. Stat. § 617.247 Subd. 4(a). He waived a jury trial and proceeded to trial before Judge Charles Porter. After considering the evidence, Judge Porter issued detailed findings of fact and conclusions of law and found Mauer guilty as charged. Minn. Stat. § 617.247 Subd. 4(a) provides:

> A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system... containing a

> pornographic work [involving a minor], *knowing or with reason to know its content and character,* is guilty of a felony and may be sentenced to imprisonment for not more than five years and a fine of lot more than $5,000... (emphasis added).

At trial Mauer stipulated that the CDs confiscated from his office contained child pornography, but he argued that he was not aware that the actors appearing on the CDs were actually minors. After the trial concluded Judge Porter found, however, that Mauer had "reason to know" the videos contained real children. The evidence on which the court based that finding included Mauer's testimony that he found girls with the "young look" to be sexually stimulating; his earlier order from CRT in 1998 of two "child erotica" projects involving actual children, as opposed to young looking adults; his disposal of the child erotica projects after he realized the actors were in fact children; and the fact that the 1998 descriptions of child erotica and the CRT mail solicitations in 2003 were similar. This evidence was sufficient to conclude that Mauer had "reason to know" that the actors depicted on the videos would be actual minor children. Judge Porter entered judgment of conviction in December 2004.

Mauer appealed his conviction and also sought post conviction relief. The district court denied Mauer's motion for post conviction relief, and in January 2007 the Minnesota court of appeals affirmed Mauer's conviction. It interpreted the statute's requirement that the defendant possess child pornography "knowing or with reason to know its content and character" to mean that possessors of child pornography must be "in some manner aware"

that the performers are minors in order to be convicted under § 617.247 Subd. 4(a). See State v. Mauer, 726 N.W.2d 810, 814 (Minn. App. 2007). It also concluded that its narrowing construction of the statutory elements could be applied to Mauer's conviction retroactively because he "had fair warning that his conduct was criminal." Id. at 816.

Mauer sought review of both decisions in the Minnesota Supreme Court. The court denied review of Mauer's claim that the intermediate appellate court's failure to reverse his conviction and remand for a new trial violated his due process rights. It granted review of the other issue in his petition challenging the constitutionality of the statute's knowledge requirement. The supreme court construed § 617.247 Subd. 4(a) to mean that a defendant charged with possession of child pornography could only be convicted if he was "subjectively aware of a substantial and unjustifiable risk that the work involves a minor." State v. Mauer, 741 N.W.2d 107, 115 (Minn. 2007) (quotation marks omitted). The court further observed that it was "possible that the district court determined Mauer had reason to know because, despite being unaware of a risk that the videos would involve children, a reasonable person under the circumstances should have known." Id. at 116. Because it was not clear whether the trial court had used a subjective test, the supreme court remanded the case to Judge Porter apply the standard it had enunciated to the facts of Mauer's case. The trial was to "review the record and reach a conclusion as to whether Mauer was subjectively aware of a substantial and unjustifiable risk that the videos he ordered from C.R.T. would involve minors." Id. The supreme court did not vacate Mauer's

conviction or order a new trial.

On remand, Judge Porter issued additional findings based on the evidence he had originally heard. He found that the solicitation received by Mauer had described the actors as "12 year old," "preteens," "young girls 11-13 years old," and "9-14 years old." He again found that Mauer had previously ordered child erotica projects similar to the CRT mailing, all of which had involved actual children. In conclusion the trial court held, that " [b]y ordering films portraying young people engaged in sex acts, with actors advertised as being between the ages of nine and fourteen, and based on his personal history of receiving films from this production company, [Mauer] knowingly took a substantial and unjustifiable risk that the actors in the films at issue in this case would be actual minors." Since Mauer had been subjectively aware of a substantial and unjustifiable risk that the videos he ordered would involve minors, his judgment of conviction was upheld.

II.

Mauer then petitioned for habeas relief under 28 U.S.C. § 2254(d)(1), arguing that the supreme court's remand order was contrary to clearly established law and a violation of due process under Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Ashton v. Kentucky, 384 U.S. 195 (1966); and Osborne v. Ohio, 495 U.S. 103 (1990). He argues that those cases stand for the proposition that where a state supreme court has narrowly construed a potentially unconstitutional statute, a defendant's prior inconsistent conviction must be reversed and a new trial ordered to ensure that he could only be

convicted under the statute as subsequently construed. The state opposed his petition for relief, arguing that Mauer had failed to exhaust his state court remedies and that his petition was "without substantive merit."

After concluding that it "would be most propitious to sidestep the more complicated exhaustion issue," United States Magistrate Judge Jeanne J. Graham proceeded directly to consideration of the merits of Mauer's habeas petition. She concluded that the supreme court's decision to reverse and remand to the trial court was not "contrary to" the Supreme Court decisions in Shuttlesworth and Osborne because neither case held that a new trial would be "the only way to ensure that a defendant is [actually] guilty" of violating a newly construed statute. Remand without a new trial was appropriate in Mauer's case, she concluded, because he had been convicted by the court rather than by a jury. Since Judge Porter had made detailed factual findings after receiving the evidence, remand was permissible for him to reconsider the evidence while applying the new standard requiring subjective awareness "of a substantial and unjustifiable risk that the work involves a minor." The magistrate judge also rejected Mauer's suggestion that the remand would prejudice him because at the time of his original trial he had no notice that the subjective awareness standard would be applied to his case.

The district court overruled Mauer's objections to the magistrate judge's report and recommendation and denied him relief under § 2254. It nevertheless granted a certificate of appealability on the following question:

> Was Petitioner denied due process, because the Minnesota Supreme Court declined to order a new trial after construing the state statute under which Petitioner was convicted, and the Court instead remanded the case to the trial court judge to consider whether Petitioner's conviction could be sustained under the new construction of the statute, based on the evidence presented at the previous trial to the court?

Mauer appeals from the denial of his petition, citing Shuttlesworth, Ashton, and Osborne in response to the certified question. He argues that these cases "establish the principle that, when a state appeals court construes a criminal statute narrowly to save its constitutionality, and when it is unclear that a defendant was convicted under the statute thus construed rather than as originally written, the defendant's conviction must be reversed and a new trial afforded." The state responds by distinguishing those cases from Mauer's. It pointed out that in each of them the defendants had either been convicted by a jury or by a judge who issued no findings of fact or recorded opinion. In the state's view, the supreme court did not violate Mauer's due process rights.

In Shuttlesworth, the earliest of the decisions on which Mauer relies, the Supreme Court reversed a state court conviction for violating an Alabama statute and remanded for a new trial. The Court pointed out that the Alabama trial court had made no findings of fact and rendered no opinion. For all that appeared, that court "may have found the petitioner guilty only by applying the literal—and unconstitutional—terms of the ordinance."

Shuttlesworth v. City of Birmingham, 382 U.S. 87, 92 (1965). There is no indication in the Court's discussion that any evidence had been received or recorded in the Alabama court.

In contrast, Judge Porter received evidence at Mauer's trial from which he made detailed findings of fact and conclusions of law in writing. Mauer's case is not "materially indistinguishable" from Shuttlesworth as he claims, for his conviction was in a court of record which made factual findings and legal conclusions after hearing the evidence. On this record the state supreme court could remand Mauer's case to the trial court for it to apply the newly announced scienter standard to the evidence presented at the original trial. See Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (state court decision is only "contrary to" federal law under § 2254(d) if it "decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts").

Ashton and Osborne are similarly unhelpful to Mauer. In both cases the Supreme Court reversed and remanded for new trials where the defendants had originally been convicted *injury trials* for violating statutes that were later narrowly construed to save their constitutionality. See Osborne v. Ohio, 495 U.S. 103, 106-07 (1990); Ashton v. Kentucky, 384 U.S. 195, 198 (1966). The Supreme Court could not remand to the original triers of fact in those cases because, not only are juries made up of varying pools of people, but also because jurors have no training in applying a revised legal standard to evidence previously admitted. Here, in contrast, the state supreme court could direct Judge Porter to apply its authoritative construction of one element of the crime charged to the same evidence presented at Mauer's 2004 trial.

Judge Porter was the same trier of fact with training in the application of revised legal standards. For these reasons Ashton and Osborne are not "materially indistinguishable" from Mauer's case. The supreme court's remand order *was* not "contrary to" either. See Williams, 529 U.S. at 413.

Furthermore, Mauer's arguments are contrary to the clearly established rule, announced in Osborne and other cases, that a narrowly construed statute "may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendant." 495 U.S. at 115 (citations omitted). The facts of Mauer's case are similar to those in Osborne, where the defendant was convicted for possession of material depicting "a minor in a state of nudity:" On appeal, the Ohio supreme court narrowly construed the governing statute to prohibit possession of nude pictures only "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." Osborne argued that it would be impermissible for the Ohio supreme court to apply retroactively its narrowed construction of the statute to him, but the Supreme Court rejected that argument " [b]ecause Osborne had notice that his conduct was criminal." See id. at 116. Likewise, Mauer had "fair warning" that possessing materials with at least reckless awareness of the age of the performers was against the law. Just as the Supreme Court held in Osborne, we conclude that "someone in [Mauer's] position would no be surprised to learn that his possession of the [materials] at issue in this case constituted a crime." Id. at 116.

Finally, we reject as purely speculative the assertion Mauer's counsel made at oral argument that he might have chosen a jury trial had he been

aware that the statute would be construed in the way the state supreme court did. Nor could Mauer point to any support in the record for the proposition that he would have presented any other evidence or used a different strategy had he been aware of the subsequent developments at the time of trial. Compare Middleton v. Roper, 455 F.3d 838, 854 (8th Cir. 2006), cert. denied, 549 U.S. 1134 (2007) (habeas petitioner's claim was properly denied when it was "founded solely on speculation"); Sargent v. Armontrout, 841 F.2d 220, 226 (8th Cir. 1988) (explaining that "speculation and conjecture will not satisfy [a habeas petitioner's] burden" to prove that his rights have been violated). Mauer took the risk of waiving a jury trial, and he cannot now claim that that risk entitles him to relief under § 2254.

III.

After reviewing the district court's findings and conclusions made after the supreme court's remand order, we conclude that Mauer has been "convicted under the statute as it [was] subsequently construed and not as it was originally written." Osborne, 495 U.S. at 118. That is all Osborne requires, and under the facts of this case, remand to the trial judge was consistent with the demands of due process. Because we conclude that Mauer's due process rights were not violated by the procedure employed by the state supreme court or his conviction on remand, we affirm the judgment of the district court denying the petition for relief.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Helmut Horst Mauer, Civil No. 08-4996 (RHK/JJG)

Petitioner, **ORDER**

v.

State of Minnesota,

Respondent.

Before the Court are Petitioner's Objections to the August 3, 2009 Report and Recommendation of Magistrate Judge Jeanne J. Graham, in which she has recommended the denial of the pending Petition for a Writ of Habeas Corpus.

The undersigned has reviewed de novo the Report and Recommendation and Petitioner's Objections thereto. That review establishes that Judge Graham carefully and exhaustively reviewed the record before her, was cognizant of and applied controlling legal principles, and reached the only conclusion justified by the record before her.

Accordingly, and upon all the files, records and proceedings herein, **IT IS ORDERED:**

1. Petitioner's Objections (Doc. No. 22) are **OVERRULED;**

2. The Report and Recommendation (Doc. No. 21) is **ADOPTED;**

3. Petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2254, (Doc. No. 1) is **DENIED;** and

4. This action is **DISMISSED WITH PREJUDICE.**

Dated: September 14, 2009

s/Richard H. Kyle

RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

HELMUT HORST MAUER,

Civil No. 08-4996 (RHK/JJG)

Petitioner,

v. **REPORT AND RECOMMENDATION**

STATE OF MINNESOTA,

Respondent.

Attorney William Galion, 247 Third Avenue South, Minneapolis, Minnesota, 55415, and Attorney Michael McGlennen, 286 Commerce at the Crossings, 250 Second Avenue South, Minneapolis, Minnesota, 55401, for Petitioner.

Peter R. Marker, Minnesota Attorney General's Office, 445 Minnesota Street, Suite 900, St. Paul, Minnesota, 55101, for Respondent.

JEANNE J. GRAHAM, United States Magistrate Judge

This matter is before the undersigned Magistrate Judge of the District Court on the petition of Helmut Horst Mauer for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed a response, (Docket Nos. 13-16), contending that the petition should be dismissed, and Petitioner subsequently filed a "Reply" to that response, (Docket No. 20). The case has been referred to this Court for report and recommendation under 28 U.S.C. § 636 and Local Rule 72.1. For the reasons discussed below, the Court will recommend that Petitioner's habeas

corpus petition be DENIED, and that this action be DISMISSED WITH PREJUDICE.

I. BACKGROUND

There is little dispute about the elemental facts of this case. Sometime prior to May 2003, federal postal inspectors uncovered an enterprise known "C.R.T.," which was distributing child pornography. The postal inspectors found Petitioner's name in C.R.T.'s customer records, and discovered that he had purchased some child pornography from C.R.T. in 1998. That information prompted the postal inspectors to send Petitioner a solicitation to order more child pornography. The solicitation offered videos showing sex acts being performed by minors, and included specific references to a 12-year-old, pre-teens, young girls 11-13 years old, and other performers from 9 to 14 years old. Petitioner responded to the solicitation by ordering four compact discs, for which he paid a total of $515.00 in cash. He also requested more information about an option to buy a custom-made video, in which a 13 year old girl would act and pose pursuant to his own personal instructions.

When the pornographic compact discs were delivered to Petitioner at his business address, he accepted them. Immediately thereafter, law enforcement authorities entered the building, and found that Petitioner had opened the compact discs, but had not yet viewed them. Petitioner was charged with four counts of violating Minn.Stat. § 617.247, subd. 4(a), which makes it a crime for a person to possess child pornography, "knowing or with reason to know its content and character."

Petitioner pled not guilty, and elected to stand

trial before a judge of the state district court for Hennepin County, Minnesota. At trial, Petitioner stipulated that some of the individuals shown in the videos he had ordered were, in fact, minors, and that the videos included images that met the statutory definition of child pornography. Petitioner testified that he thought the individuals in the videos would be over the age of 18, but he acknowledged that some of them could have been as young as 9 years old.

Based on the evidence introduced at Petitioner's trial, the judge found that Petitioner had reason to know that there would be minors in the videos he had ordered. The judge also rejected Petitioner's entrapment defense. Petitioner was found guilty of three counts of possession of child pornography, in violation of Minn.Stat. § 617.247, subd. 4(a). (The trial judge's "Findings of Fact Essential to the Verdict" are included in the present record as Respondent's Appendix, [Docket No. 16], Appendix 7.)[1]

Following his conviction, Petitioner filed a direct appeal in the Minnesota Court of Appeals. His appeal was stayed while he pursued a post-conviction motion, in which he challenged the constitutionality of the statute under which he was convicted. In the post-conviction motion, Petitioner argued that the statute at issue, Minn.Stat. § 617.247, subd. 4(a), violates the First Amendment, because the statutory

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[1] The record includes little information about Petitioner's sentence. As far as the Court can tell, he was sentenced to five years on probation. (See Petition, [Docket No. 1], p. 1, § 3; Petitioner's memorandum regarding custody status, [Docket No. 7]; "Hennepin County Register of Actions," Respondent's Appendix , [Docket No. 16], Appendix 1.) Petitioner's sentence is not at issue here; he is presently challenging only his conviction.

phrase "with reason to know" allows for a conviction based on evidence that the defendant negligently failed to realize he possessed child pornography. The trial court denied Petitioner's post-conviction motion, and Petitioner appealed that ruling as part of his direct appeal.

The Minnesota Court of Appeals acknowledged that the statutory phrase "with reason to know" was constitutionally suspect, in light of prior decisions by the United States Supreme Court, including New York v. Ferber, 458 U.S. 747 (1982), and United States v. X-Citement Video, Inc., 513 U.S. 64 (1994). The Court of Appeals explained that -

> "To protect free expression, criminal child-pornography laws must... include 'some element of scienter on the part of the defendant...' [quoting Ferber, 458 U.S. at 765]. A child-pornography statute 'completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts..." [quoting X-Citement Video, Inc., 513 U.S. at 78]."

State v. Mauer, 726 N.W.2d 810, 813 (Minn.App. 2007) (hereafter "Mauer I").

The State Court of Appeals also acknowledged, (at least implicitly), that if the statutory phrase "with reason to know" established a standard of culpability synonymous with mere negligence, then the degree of scienter required for conviction under Minn.Stat. § 617.247, subd. 4(a), could be constitutionally inadequate. Id. However, the Court immediately rejected that possibility, ruling that: "As we interpret the statute,...the requirement of 'knowing or with

reason to know' imposes a scienter requirement that is more demanding than a civil - or a criminal - negligence standard." Id. at 813-14. The Court went on to explain that "[w]e... interpret 'reason to know' as used in this particular statute to require a possessor to be 'in some manner aware' that the performer [in a pornographic video] is a child." Id. at 814 (emphasis added). Thus, under the Court of Appeals' interpretation of Section 617.247, subd. 4(a), a person cannot be convicted of violating the statute unless he was "in some manner aware" that an actual minor was depicted in some pornographic material that he possessed.

After clarifying the scienter standard of Section 617.247, subd. 4(a), the Minnesota Court of Appeals next considered whether Petitioner's conviction could be upheld in light of the new interpretation of the statute. Id. at 815. The Court explained its resolution of this issue as follows:

> "Under the circumstances, [Petitioner] had fair warning that his conduct was criminal. The district court concluded that [Petitioner] had 'reason to know' that the performers were minors. Although the district court did not use the words 'in some manner aware,' the district court made extensive findings of fact. Those findings demonstrate that [Petitioner] undoubtedly was in some manner aware of the age of the performers. [Petitioner's] conviction is therefore affirmed."

Id. at 816.

After the Minnesota Court of Appeals upheld Petitioner's conviction, he sought further review in

the Minnesota Supreme Court. Petitioner presented two arguments in his application for further review:

(1) that the new scienter requirement established by the Court of Appeals' decision, (i.e., the "in some manner aware" standard), was constitutionally inadequate; and

(2) that any judicial clarification of the statutory language would effectively alter the elements of the offense, which would necessitate a new trial to determine whether the State could prove all of the newly-established elements of the offense.[2]

The Minnesota Supreme Court agreed to hear Petitioner's case, and later filed an opinion that modified and superceded the earlier decision of the State Court of Appeals. State v. Mauer, 741 N.W.2d 107 (Minn. 2007) (hereafter "Mauer II"). The Supreme Court agreed with the Court of Appeals' initial determination, namely that -

"[i]n order to satisfy the First

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[2] A copy of Petitioner's application for further review is included in the present record as an attachment to Petitioner's Reply. (Docket No. 20-2.) The "Statement of Legal Issues" section of that application describes the two issues presented to the Minnesota Supreme Court as follows:

> "1. Does Minn. Stat. § 617.247, Subd. 4(a) violate the First Amendment by failing to require knowledge of the minority of the performers as an element of the offense?...
>
> 2. Does due process require that Petitioner's conviction be reversed and the case remanded for a new trial, since his conviction was not based upon a finding that the State had proved each of the elements of the offense as those elements were subsequently construed?"

("Petition For Review Of Decision Of Court Of Appeals," [Docket No. 20-2], p. 2.)

> Amendment, the demonstration of a child pornography possessor's scienter requires proof of some subjective awareness, not just proof that the possessor was objectively negligent in failing to know that a performer in the work was a minor."

Id. at 110.

However, the Supreme Court's interpretation of the statutory scienter requirement was somewhat different from the Court of Appeals'. The higher court declined to adopt the lower court's "in some manner aware" standard, and instead described the statutory scienter requirement this way:

> "[W]e hold that, under Minn.Stat. § 617.247, subd. 4(a), a possessor of child pornography has 'reason to know' that a pornographic work involves a minor where the possessor is subjectively aware of a 'substantial and unjustifiable risk' that the work involves a minor."

Id. at 115 (emphasis added).

Having determined how the statutory "reason to know" language should be construed to ensure the statute's constitutionality, the Supreme Court turned to Petitioner's second argument, and considered whether the trial judge would have found Petitioner guilty under the newly-narrowed construction of the statute. The Court decided that it could not fully discern whether the trial judge would have found that Petitioner "was subjectively aware of a substantial and unjustifiable risk that the videos would involve children." Id. at 816. Therefore, the case was remanded to the trial judge, so he could review the

evidence presented at trial, and determine whether that evidence would support a guilty verdict under the Supreme Court's construction of the statute. The Court summarized its final ruling as follows:

> "Because we cannot be certain that the district court's findings of fact and conclusions of law would support [Petitioner's] conviction under our narrowing construction of 'reason to know,' we conclude that the district court is in the best position to review the record and reach a conclusion as to whether [Petitioner] was subjectively aware of a substantial and unjustifiable risk that the videos he ordered from C.R.T. would involve minors."

Id.

On remand, the trial court judge reviewed the original trial court record, and then entered a new memorandum and order, dated March 24, 2008. (A copy of that memorandum and order, [hereafter "Post-remand Order"], is included in the current record in Respondent's Appendix, [Docket No. 16], Appendix 2.) The trial judge concluded that Petitioner "was subjectively aware of a substantial and unjustifiable risk that the pornographic works he ordered in this case involved actual minors." (Post-remand Order, p. 1.) Therefore, Petitioner's original three-count conviction was upheld under the Minnesota Supreme Court's construction of Minn. Stat. § 617.247, subd. 4(a). (Id.)

In the Post-remand Order, the trial judge carefully explained why the evidence presented at Petitioner's trial proved that Petitioner was

subjectively aware of a substantial and unjustifiable risk that actual minors were shown in the pornographic videos that he ordered and possessed. The judge pointed out that the solicitation materials that prompted Petitioner's order expressly stated that the videos would depict children between 9 and 14 years of age, and "[t]he risk that the final product would involve actual minors, as advertised, was therefore substantial." (Id., p. 3.)

The judge also pointed out that:

> "[Petitioner] admitted that he had previously ordered films from the same company in 1998; that the earlier films involved actual minors; and that the descriptions of the current and former films were similar. These admissions prove that, based on his personal history with films from this production company, [Petitioner] was subjectively aware that this production company had a history of using actual minors, rather than young-looking adults portraying minors. [Petitioner] was therefore subjectively aware that when he ordered the advertised products, he would likely receive pornographic work involving actual minors."

(Id., pp. 4-5.)

Thus, the trial judge concluded that:

> "By ordering films portraying young people engaged in sex acts, with actors advertised as being between the ages of nine and fourteen, and based on his personal history of receiving films from

> this production company, [Petitioner] knowingly took a substantial and unjustifiable risk that the actors in the films at issue in this case would be actual minors."

(Id., p. 5.)

Petitioner did not challenge the Post-remand Order in the state appellate courts. However, several months after that order was entered, he filed his current federal habeas corpus petition.

Petitioner is not presently challenging the constitutionality of the statute under which he was convicted, or the manner in which the Minnesota Supreme Court construed the statute to ensure its constitutionality. Instead, Petitioner is now claiming that the Minnesota Supreme Court deprived him of his constitutional right to due process, by remanding the case to the trial judge for further review of the original trial court record. According to Petitioner, the State Supreme Court should have voided and vacated his conviction, and remanded the case for a full new trial.

Petitioner has summarized his current habeas corpus claim as follows:

> "Petitioner was denied due process when his conviction was not reversed and the case remanded for a new trial, since it was unclear whether his conviction was based upon a finding by the trial court that the state had proved each element of the offense as construed by the Minnesota Supreme Court. Moreover, the action of the Minnesota Supreme Court remanding the case to the district court for review of

> its findings on the record is insufficient to satisfy the demands of due process, since a review on the record cannot take the place of a trial properly conducted under the correct standard of law. For these reasons petitioner's conviction should be reversed and the case remanded for a new trial."

(Petitioner's Memorandum In Support Of Petition For Writ Of Habeas Corpus, [Docket No. 2], p. 7.)

Respondent contends that this action should be dismissed because (a) Petitioner failed to exhaust all of his available state court remedies before filing this action, and (b) Petitioner's current habeas claim is, in any event, unsustainable on the merits. For the reasons discussed below, the Court concludes that Petitioner's habeas corpus petition should be denied on the merits.

II. EXHAUSTION OF STATE COURT REMEDIES

Respondent initially argues that Petitioner failed to exhaust his state court remedies, as required by 28 U.S.C. § 2254(b), because he did not ask the Minnesota appellate courts to review the trial judge's Post-remand Order. Petitioner disagrees, contending that his current habeas corpus claim was fairly presented to the Minnesota Supreme Court in his petition for further review in his direct appeal. (Petitioner's Reply, [Docket No. 20], pp. 2-3.)

Normally, of course, a federal court must be satisfied that a habeas petitioner has properly exhausted his state court remedies for all of his claims before considering those claims on the merits. However, "judicial economy sometimes dictates reaching the merits if the merits are easily resolvable

against a petitioner while the procedural bar issues are complicated." Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir.) (en banc), cert. denied, 528 U.S. 846 (1999). See also 28 U.S.C. § 2254(b)(2) ("[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"); Tokar v. Bowersox, 198 F.3d 1039, 1049 (8th Cir. 1999) ("[s]ince we find the issue can be easily resolved on the merits, we need not delve into all of [the petitioner's] excuses for his procedural default"), cert. denied, 531 U.S. 886 (2000); Trussell v. Bowersox, 447 F.3d 588, 590 (8th Cir.) (confirming that procedural default is not a jurisdictional bar to review of a habeas claim, and addressing petitioner's apparently defaulted claim on the merits "in the interest of judicial economy"), cert. denied, 549 U.S. 1034 (2006).

In this case, both parties have presented reasonable and persuasive arguments in support of their respective positions on the issue of whether Petitioner has exhausted his state court remedies. Respondent has correctly pointed out that the Minnesota appellate courts have never been asked to review the trial judge's Post-remand Order, which was the final adjudication of Petitioner's guilt. However, Petitioner has correctly pointed out that he did present a due process claim for a new trial in his petition for further review in the Minnesota Supreme Court. Therefore, the claim raised in the present habeas petition arguably was exhausted on direct appeal.[3]

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[3] To the extent that Petitioner might now be attempting to advance any new claim that was not included in the petition for review presented to the Minnesota Supreme Court, he clearly

While the exhaustion issue presented in this case may be debatable, Petitioner's substantive claim for relief is not. It is clear, (for reasons discussed below), that Petitioner's current habeas corpus claim cannot be sustained on the merits. Thus, the Court finds that it would be most propitious to sidestep the more complicated exhaustion issue, and proceed directly to the merits of Petitioner's due process claim. As our Court of Appeals has aptly observed, "[t]he simplest way to decide a case is often the best." Chambers v. Bowersox, 157 F.3d 560, 564, n. 4 (8th Cir. 1998), cert. denied, 527 U.S. 1029 (1999).

III. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act, ("AEDPA"), prescribes the standards that govern this Court's substantive review of Petitioner's current habeas corpus claim. The relevant portion of AEDPA, 28 U.S.C. § 2254(d), provides that:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

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has not satisfied the exhaustion of state court remedies requirement. The only due process claim that could have been exhausted, and thus the only such claim that could be reviewable here, is the particular due process claim that Petitioner presented in his petition for further review.

> determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

In Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court discussed the meaning of this statute, and how it should be applied by the federal district courts. The Supreme Court recognized that

> "a state-court decision can be 'contrary to' this Court's clearly established precedent in two ways. First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours."

Id. at 405.

> "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."

Id. at 413.

The Court also explained that

> "A federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable.... [¶] [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."

Id. at 409, 411 (emphasis added).

A writ of habeas corpus may also be available where the state courts' resolution of a prisoner's criminal case is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). In other words, habeas relief can be granted if the conviction is based on findings of fact that could not reasonably be derived from the state court evidentiary record. When reviewing a state court decision, however, "a federal court... presumes that the state court's factual determinations are correct," and that presumption "may be rebutted only by clear and convincing evidence." Lee v. Gammon, 222 F.3d 441, 442 (8th Cir. 2000). See also 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall

have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

Needless to say, a federal court is not allowed to conduct its own de novo review of a habeas petitioner's constitutional claims. Habeas relief cannot be granted unless the petitioner has identified, and substantiated, a specific error committed by the state courts. Moreover, he must show that the state courts committed the type of error that is actionable under § 2254(d), as that statute has been interpreted by the Supreme Court in Williams.

IV. DISCUSSION

Petitioner contends that the Minnesota Supreme Court erred, and deprived him of his constitutional right to due process, by remanding his case to the trial judge to determine whether the evidence produced at trial showed that Petitioner "was subjectively aware of a substantial and unjustifiable risk that the videos he ordered from C.R.T. would involve minors." Mauer II, 741 N.W.2d at 116. According to Petitioner, his conviction should have been declared altogether void, and he should have been granted an entirely new trial to determine whether he was guilty under the Mauer II interpretation of Minn. Stat. § 617.247, subd. 4(a). Petitioner's argument is based primarily on two decisions by the United States Supreme Court Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965), and Osborne v. Ohio, 495 U.S. 103 (1990).[4]

Shuttlesworth was brought to the Court by a defendant in an Alabama criminal case, who was

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[4] Petitioner has also cited Ashton v. Kentucky, 384 U.S. 195 (1966), which followed and reiterated some of the principles discussed in Shuttlesworth.

found guilty of violating a city ordinance that broadly prohibited individuals from standing or loitering on a public sidewalk. By the time the case reached the Supreme Court, the Alabama Court of Appeals had already ruled, in a different case, that the ordinance should be narrowly construed, so that it would not inhibit conduct protected by the First Amendment.[5] The City argued that the defendant's conviction should survive under the narrowed construction of the ordinance at issue. That argument was rejected, because, at the time of the defendant's conviction, the trial court "was without guidance from any state appellate court as to the meaning of the ordinance." Shuttlesworth, 382 U.S. at 92.

Because the trial court did not yet have the benefit of the narrowed construction of the ordinance, (which was required to make the ordinance constitutional), it was impossible to know whether the defendant would have been found guilty of violating that narrowed construction of the ordinance. The Supreme Court explained that -

> "The trial court made no findings of fact and rendered no opinion. For all that appears, that court may have found the petitioner guilty only by applying the literal - and unconstitutional - terms of the ordinance.... Because we are unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance, the petitioner's conviction

[5] The state court ruled that the statute "applies only when a person who stands, loiters, or walks on a street or sidewalk so as to obstruct free passage refuses to obey a request by an officer to move on." Shuttlesworth, 382 U.S. at 91.

under [the ordinance] cannot stand."

Id. The judgment of conviction was reversed, and the case was remanded to the state courts "for further proceedings not inconsistent with" the Supreme Court's decision. Id. at 95.

In Osborne, the Supreme Court upheld an Ohio child pornography statute against a First Amendment challenge. The Court found that the statute, as narrowly construed by the Ohio Supreme Court, was not "overbroad," because it prescribed only conduct that was not constitutionally protected. 495 U.S. at 112-14. The defendant's conviction was reversed, however, because the jury in his case had not been fully instructed about all of the required elements of the charged offense under the newly-narrowed construction of the statute. The Supreme Court pointed out that -

> "According to the Ohio Supreme Court, in order to secure a conviction under... [the statute at issue], the State must prove both scienter and that the defendant possessed material depicting a lewd exhibition or a graphic focus on genitals. The jury in this case was not instructed that it could convict [the defendant] only for conduct that satisfied these requirements."

495 U.S. at 123. Because the jury did not determine whether the evidence would support a conviction under the narrowed construction of the statute, the case was remanded for a new trial.

Based on Shuttlesworth and Osborne, Petitioner contends that he is constitutionally entitled to a new trial on the charges brought against him

under Minn. Stat. § 617.247, subd. 4(a). It will be recalled that the Minnesota Supreme Court did not grant Petitioner a new trial, but simply remanded the case to the trial judge for further consideration of the previously presented evidence. Petitioner claims that this relief was constitutionally inadequate, and that an all new trial is required to determine whether there is sufficient evidence to prove each element of the charged offense beyond a reasonable doubt.

According to Petitioner, "a remand to the trial court to reconsider its findings on the record cannot satisfy the demands of due process elucidated by the United States Supreme Court." (Petitioner's Memorandum In Support Of Petition For Writ Of Habeas Corpus," [Docket No. 2], pp. 5-6.) Petitioner contends that the only way to determine whether there is sufficient proof of each element of the statute, as the statute was interpreted in Mauer II, is to grant him a new trial. The Court disagrees.

Neither Shuttlesworth nor Osborne holds that a new trial must always be conducted whenever a defendant has been convicted under a criminal statute that is subsequently construed to avoid a potential constitutional defect. In both of the cases cited by Petitioner, the Supreme Court set aside the defendant's conviction only because it was impossible to determine, based on the existing record, whether the factfinder at the trial court level, (either the judge or jury), would have found the defendant guilty under the new construction of the statute at issue.

The rule that was established in Shuttlesworth, and reiterated in Osborne, is that "where a State Supreme Court narrows an unconstitutionally overbroad statute, the State must ensure that defendants are convicted under the statute as it is

subsequently construed and not as it was originally written." Osborne, 495 U.S. at 118 (emphasis added). The Supreme Court did not say in Shuttlesworth or in Osborne - or in any other case cited by Petitioner - that conducting a new trial is the only way to ensure that a defendant is guilty under an appellate court's later construction of the applicable statute. Therefore, it cannot be said that the Minnesota Supreme Court's remand order in Petitioner's case is directly "contrary to" the Supreme Court's rulings in Shuttlesworth and Osborne, for purposes of Section 2254(d)(1).

Furthermore, Petitioner has not shown that the Minnesota Supreme Court applied the apposite rule from Shuttlesworth and Osborne in an "objectively unreasonable" manner. The critical circumstance in both Shuttlesworth and Osborne was the impossibility of knowing whether the trier of fact would have found the defendant guilty under the subsequently narrowed construction of the statute at issue. In Shuttlesworth, the defendant's conviction was reversed "because it was not clear that the State had convicted the defendant under the ordinance as construed rather than as written." Osborne, 495 U.S. at 118. Likewise, in Osborne, the Court remanded the case for a new trial "to ensure that Osborne's conviction stemmed from a finding that the State had proved each of the elements" of the Ohio Supreme Court's construction of applicable statute. Id. at 126.

However, the critical findings that were missing in Shuttlesworth and Osborne are not missing here. The Minnesota Supreme Court effectively cured the defect identified in Shuttlesworth and Osborne, by remanding the case to the trial court for the express purpose of determining whether the State had proved each of the elements of

Section 617.247, subd. 4(a), as the statute was construed in Mauer II.

In this case, unlike Shuttlesworth and Osborne, the record includes a specific determination, by the original trier of fact, that the State had sufficiently proven each element of the statutory offense, as construed by Minnesota Supreme Court. Moreover, the trial judge's Post-remand Order clearly shows that the trier of fact found that the State had indeed sufficiently proven each element of the charged offense as construed in Mauer II The remand instructions provided by the Minnesota Supreme Court in Mauer II, combined with the trial judge's comprehensive Post-remand Order, clearly distinguish the present case from Shuttlesworth and Osborne. The remand instructions and the Post-remand Order eliminated the problematic uncertainty found in Shuttlesworth and Osborne.

Petitioner baldly asserts that "[a] memorandum filed by the trial court more than three years after the verdict and entry of judgment cannot support the validity of the conviction, where the original findings of the trial court do not establish that the defendant was convicted under the proper construction of the statute." (Petitioner's Reply, [Docket No. 20], p. 7.) However, Petitioner offers no legal authority to support this assertion. The Minnesota Supreme Court obviously concluded that, in this particular case, a new trial was not necessary, and that the requirements of Shuttlesworth and Osborne could be met by remanding the case to the trial court, with instructions to review the record and determine whether the elements of the statute, as construed, had been proven. Petitioner has not shown that this was an objectively unreasonable application

of the apposite Supreme Court precedents.

There are two final points that warrant brief discussion. First, the Court recognizes that the course prescribed by Mauer II - remand for further review in light of the newly construed statute - might not work in every case. When the trier of fact is a jury, rather than the trial judge, it may not be feasible to remand the case for review of the evidence in light of a later interpretation of the applicable statute. Thus, in Osborne, a case that was tried before a jury, the Supreme Court ordered a new trial.

However, in Shuttlesworth, a case tried before a judge, the Supreme Court did not order a new trial. Instead, the Court merely remanded the case for further proceedings "not inconsistent with this opinion." 382 U.S. 94. This more flexible remand directive apparently would have allowed the Alabama Court of Appeals to send the case back to the trial judge to consider whether the evidence submitted at trial would have supported a conviction under the narrowed construction of the applicable statute. In other words, it appears that, under the Supreme Court's remand order, the Alabama state courts could have followed a course of action similar to that prescribed by Mauer II.

Petitioner contends that it "should make no difference" whether a defendant was tried before a judge or a jury. (Petitioner's Memorandum In Support Of Petition For Writ Of Habeas Corpus, [Docket No. 2], p. 6.) As a practical matter, however, it may indeed make a difference. A remand for further review, as ordered by Mauer II, may be entirely satisfactory for a case tried before a judge, while that same course of action may not be feasible in a case that was originally tried before a jury. However, the remand

procedure prescribed by Mauer II is not unconstitutional, simply because it may not always be feasible.

Finally, Petitioner argues that he should have been granted a new trial so he could present new evidence and new defenses in opposition to the clarified interpretation of Minn.Stat. § 617.247, subd. 4(a). This argument might warrant extensive consideration under different circumstances, but not under the circumstances presented here. Petitioner has not identified any new evidence that he might have introduced at a new trial, and he has not suggested any new defense strategy that he might have tried to interpose at a new trial. There could, perhaps, be cases in which a new trial would be required to give a defendant an opportunity to present some new, specific, and relevant evidence in response to an appellate court's construction of a statute. However, Petitioner has not shown that this is such a case. He cannot be granted a writ of habeas corpus based on an argument that is supported only by pure speculation. Larson v. United States, 833 F.2d 758, 759 (8th Cir. 1987), cert. denied, 486 U.S. 1008 (1988).

V. CONCLUSION

In Mauer II, the Minnesota Supreme Court properly recognized it could not affirm Petitioner's conviction based on the existing record, because it was unclear whether the trial judge would have found Petitioner guilty under the Supreme Court's narrowed construction of Minn.Stat. § 617.247, subd. 4(a). Therefore, the Supreme Court properly remanded the case to the trial judge to determine whether the evidence introduced at Petitioner's trial would support a conviction under the narrowed construction of the statute. The trial judge determined that the

evidence would support a conviction under the narrowed construction of the statute, and he thoroughly explained why that was so. No further proof of Petitioner's guilt is required in this case.

If Petitioner had been tried before a jury, or if he were able to identify some relevant new evidence or new defense strategy that might have affected the outcome of the remand proceedings, then, perhaps, a new trial would have been apropos. However, neither of those circumstances is present here.

In sum, Petitioner has not shown that, under the particular circumstances of this case, a new trial was constitutionally mandated. He has not demonstrated that the Minnesota Supreme Court's remand order - calling for review of the evidence, but not a new trial - is contrary to, or an unreasonable application of, the apposite decisions of the United States Supreme Court. Thus, the Court concludes that Petitioner cannot be granted a writ of habeas corpus.

VI. RECOMMENDATION

Based on the foregoing, and all the files, records and proceedings herein,

IT IS HEREBY RECOMMENDED that:

1. Petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2254, (Docket No. 1), be DENIED; and

2. This action be DISMISSED WITH PREJUDICE.

Dated: August 3, 2009

s/ *Jeanne J. Graham*
JEANNE J. GRAHAM
United States Magistrate Judge

NOTICE

Pursuant to D. Minn. LR 72.2(b), any party may object to this Report and Recommendation by filing and serving specific, written objections by **August 17, 2009.** A party may respond to the objections within ten days after service thereof. Any objections or responses filed under this rule shall not exceed 3,500 words. A District Judge shall make a de novo determination of those portions to which objection is made. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the United States Court of Appeals for the Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Helmut Horst Mauer, Civil No. 08-4996 (RHK/JJG)

Petitioner,

v. ORDER

State of Minnesota,

Respondent.

INTRODUCTION

Petitioner commenced this action by filing a habeas corpus petition under 28 U.S.C. § 2254, challenging the validity of his conviction and sentence in a Minnesota state criminal case. The matter was assigned to Magistrate Judge Jeanne J. Graham for a Report and Recommendation, ("R&R"). The Magistrate Judge filed an R&R on August 3, 2009, (Docket No. 21), recommending that Petitioner's habeas corpus petition should be dismissed on the merits, and with prejudice. This Court adopted the R&R, over Petitioner's objections, and the action was dismissed by a final judgment entered on September 15, 2009. (See Docket Nos. 22, 24 and 25).

Petitioner subsequently filed a notice of appeal, and an application for a Certificate of Appealability. (See Docket Nos. 26 and 27.) The Court now finds that Petitioner should be granted a COA for a single issue, which is described below.

DISCUSSION

A state prisoner is not permitted to appeal a final order in a habeas corpus proceeding without first securing a Certificate of Appealability, ("COA"). 28

U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b)(1). Federal district courts cannot grant a COA unless the prisoner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997).

A COA will not necessarily be granted simply because an appeal is pursued in good faith and raises a non-frivolous issue. Kramer v. Kemna, 21 F.3d 305, 307 (8th Cir. 1994) ("[g]ood faith and lack of frivolousness, without more, do not serve as sufficient bases for issuance of a certificate"). Instead, the prisoner must satisfy a higher standard; he must show that the issues to be raised on appeal are "debatable among reasonable jurists," that different courts "could resolve the issues differently," or that the issues otherwise "deserve further proceedings." Flieger v. Delo, 16 F.3d 878, 882-83 (8th Cir.), cert. denied, 513 U.S. 946 (1994), citing Lozado v. Deeds, 498 U.S. 430, 432 (1991) (per curiam); Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997), cert. denied, 525 U.S. 834 (1998). When a district court grants a COA, it is "inforrn[ing] the Court of Appeals that the petitioner presents a colorable issue worthy of an appeal." Kruger v. Erickson, 77 F.3d 1071, 1073 (8th Cir. 1996) (per curiam). See also Slack v. McDaniel, 529 U.S. 473, 484 (2000) (granting a COA signifies that the issues raised "'deserve encouragement to proceed further') (citation omitted).

In this case, the Court finds that Petitioner meets the criteria for a COA for the due process claim that was addressed on the merits in the Magistrate Judge's R&R. The Court remains satisfied that the Magistrate Judge correctly analyzed Petitioner's claim, and properly recommended that the claim be

denied on the merits. However, the Court finds that Petitioner's due process claim is "debatable among reasonable jurists," (Flieger, supra), and presents an issue that is worthy of appellate review.

The Court will therefore grant Petitioner a COA for the following issue:

Was Petitioner denied due process, because the Minnesota Supreme Court declined to order a new trial after construing the state statute under which Petitioner was convicted, and the Court instead remanded the case to the trial court judge to consider whether Petitioner's conviction could be sustained under the new construction of the statute, based on the evidence presented at the previous trial to the court?

CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein,

IT IS HEREBY ORDERED that:

Petitioner's application for a Certificate of Appealability, (Docket No. 27), is GRANTED for the issue described herein.

Dated: November 4, 2009

s/Richard H. Kyle
RICHARD H. KYLE
United States District Court Judge

STATE OF MINNESOTA

IN SUPREME COURT

A05-460

Court of Appeals Hanson, J.

State of Minnesota,
Respondent,

vs.

Filed: November 15, 2007
Office of Appellate Courts

Helmut Mauer,
Appellant.

SYLLABUS

1. Because the First Amendment of the United States Constitution requires that laws criminalizing the possession of child pornography include some element of scienter, and "reason to know" is broad enough to include some mental states that may not satisfy that requirement, "reason to know" as used in Minn. Stat. § 617.247, subd. 4(a) (2006) is ambiguous.

2. Under Minn. Stat. § 617.247, subd. 4(a), a possessor of child pornography has "reason to know" that a pornographic work involves a minor where the possessor is subjectively aware of a "substantial and unjustifiable risk" that the work involves a minor.

3. Because it is unclear whether the district court's findings of fact and conclusions of law would support appellant's conviction under the "reason to know" standard, as thus interpreted, the appropriate disposition is to remand to the district court to reconsider its findings of fact and conclusions of law,

on the present record, applying the legal standard announced in this opinion.

Affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with this opinion.

Heard, considered, and decided by the court en banc.

OPINION

HANSON, Justice.

We are asked to decide whether the provision within Minn. Stat. § 617.247, subd. 4(a) (2006) (the "child pornography statute"), making it a crime to possess child pornography if the possessor has "reason to know" that the work involves a minor, requires proof of a constitutionally adequate element of scienter. Following a bench trial, the district court found appellant Helmut Horst Mauer guilty on three counts of possession of a pornographic work involving a minor because Mauer had reason to know that performers in the videos he possessed would be children. Mauer appealed but also sought postconviction relief, arguing that the statute violates the First Amendment for lack of an adequate scienter element. The district court denied Mauer's postconviction petition because it concluded that "reason to know" contained a constitutionally adequate level of scienter. The court of appeals affirmed, interpreting "reason to know" to require that a child pornography possessor be "in some manner aware" of facts which lead him to believe that a performer in the pornographic work is a child. *State v. Mauer*, 726 N.W.2d 810, 814 (Mimi. App. 2007). Because we conclude that the child pornography statute is not unconstitutional, but we interpret

"reason to know" in a manner that is slightly different than the court of appeals, we affirm in part, reverse in part, and remand to the district court for reconsideration consistent with this opinion.

The facts of this case are undisputed. In May 2003 Mauer received a solicitation to purchase videos from a business known as "C.R.T." The business had actually been seized by United States postal inspectors, who prepared the solicitation as part of an undercover operation. The postal inspectors obtained Mauer's name and address from C.R.T.'s customer records, which indicated that he had ordered several films of child erotica in 1998 in response to a similar solicitation.[1] The May 2003 solicitation graphically described sexual acts depicted in the videos and the ages of individuals involved in them, including references to a "12 year old," "preteens," "young girls 11-13 years old," and "[performers] from 9 to 14 years old." Mauer ordered videos fitting those descriptions, and requested more information about the solicitation's "Write Your Own Script" option through which C.R.T. customers could send in details of a sexual fantasy to be acted out by a 13-year-old girl.

A postal inspector, posing as a Federal Express employee, delivered the videos to Mauer at his business in Minneapolis. Shortly after Mauer took that delivery, law enforcement officers entered his business and discovered that Mauer had opened the packages but had not viewed the contents of any of the videos. Based on these facts, the State charged Mauer with four counts of possession of pornographic

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[1] When interviewed by law enforcement officers concerning the videos he ordered from 1998, Mauer stated that he kept them for two weeks,' but upon discovering there were actual children depicted in them, he threw them away.

works involving minors. At trial, Mauer testified that he did not believe the videos would actually involve minors,[2] but the parties stipulated that some of the videos seized from Mauer included performers that were minors.

The district court found Mauer guilty on three counts because he had reason to know that some performers in the videos were minors. Mauer appealed and also pursued postconviction relief on the grounds that the child pornography statute violates the First Amendment for lack of a sufficient scienter element. The district court denied Mauer's petition for postconviction relief.

The court of appeals affirmed the conviction and the denial of postconviction relief. The court interpreted "reason to know" to "require a possessor [of sexually explicit material involving a minor] to be 'in some manner aware' that the performer is a child." *Mauer*, 726 N.W.2d at 814. The court then concluded that its narrowing construction satisfied the First Amendment because it imposed a "scienter requirement that is more demanding than a civil - or a criminal - negligence standard." *Id.* at 813-14. The court recognized that the district court did not explicitly use that narrowing construction, but held that the district court's findings nevertheless satisfied this standard. *Id.* at 815-16.

I.

We first consider whether Minnesota's child pornography statute contains a sufficient scienter element to satisfy the First Amendment. Although

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[2] A postal inspector testified that during the interview of Mauer after the initial controlled delivery, Mauer admitted that he knew the videos would involve actual children.

non-obscene pornography involving adult performers is protected speech under the First Amendment, child pornography is not protected. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73 (1994); *New York* v. *Ferber*, 458 U.S. 747, 764-65 (1982). Because of the state's compelling interest in protecting the "physical and psychological well-being" of children, a state may constitutionally prohibit possession of child pornography. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990). In order to prohibit the possession of child pornography and yet avoid the risk of chilling protected speech in adult pornography, child pornography laws must include an element of scienter with respect to the age of minority of the performers. *See X-Citement Video*, 513 U.S. at 73 ("[T]he age of the performers is the crucial element separating legal innocence from wrongful conduct."); *see also Ferber*, 458 U.S. at 756 ("Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy."); *Mishkin v. New York*, 383 U.S. 502, 511 (1966) ("The Constitution requires proof of scienter [in obscenity laws] to avoid the hazard of self-censorship of constitutionally protected material.").

Scienter is the "degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission." *Black's Law Dictionary* 1373 (8th ed. 2004). In order to satisfy the First Amendment, the demonstration of a child pornography possessor's scienter requires proof of some subjective awareness, not just proof that the possessor was objectively negligent in failing to know that a performer in the work was a minor.

"Negligence is not a state of mind; it is a standard of conduct a defendant is expected to maintain regardless of his state of mind." Christina Egan, *Level of Scienter Required for Child Pornography Distributors: The Supreme Court's Interpretation of "Knowingly" in 18 U.S.C. § 2252*, 86 J. Crim. L. & Criminology 1341, 1379 (1996). Because the negligent possessor need not be aware of facts related to the performer's age, the risk of chilling protected speech would increase as possessors of constitutionally permissible material were compelled to discover the ages of those performing. *Cf id.* at 1379 (noting the same potential chilling effect of imposing a negligence standard on distributors).

With this context in mind, we turn to Minnesota's child pornography statute, Minn. Stat. § 617.247, subd. 4(a), which reads:

> A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work, *knowing or with reason to know its content and character,* is guilty of a felony.[3]

(Emphasis and footnote added.) Mauer argues that

[3] "Pornographic work" is defined in Minn. Stat. § 617.246, subd. 1(f) (2006). Because the parties stipulated that certain videos in Mauer's possession included actual minors involved in sexual conduct, the portion of the definition relevant to this case is contained in subdivision 1(f)(2)(i), which reads: " 'Pornographic work' means * * * any visual depiction, including any * * * video * * * whether made or produced by electronic, mechanical, or other means that * * * uses a minor to depict actual or simulated sexual conduct."

the "reason to know" culpability standard in the child pornography statute permits conviction where a possessor is merely negligent with respect to the age of minority of a performer, and thus dispenses with the constitutional scienter requirement. Addressing this argument requires that we determine the meaning of the phrase "reason to know" as it is used in the child pornography statute.

Statutory interpretation is a question of law that we consider under a de novo standard of review. *State v. Al-Naseer*, 734 N.W.2d 679, 683 (Minn. 2007). The primary objective for a court's interpretation of statutory language is to ascertain and give effect to the legislature's intent. Minn. Stat. § 645.16 (2006). "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." *Id.* An ambiguity exists only where a statute's language is subject to more than one reasonable interpretation. *State v. Stevenson*, 656 N.W.2d 235, 238 (Minn. 2003).

The child pornography statute contains an express scienter element. It requires proof that a person possessing a pornographic work does so "knowing or with reason to know its content and character." Minn. Stat. § 617.247, subd. 4(a). The terms "content and character" refer to the nature of the "pornographic work," the definition of which requires that individuals depicted in the work are minors. Minn. Stat.. § 617.246, subd. 1(f)(2)(i) (2006). This relationship between the definition of "pornographic work" and the scienter element eliminates any question of whether the child pornography statute is "completely bereft of a

scienter requirement as to the age of the performers." *See XCitement Video*, 513 U.S. at 78. And the express inclusion of a scienter element in the child pornography statute means that this is not a case where we may treat a statute's silence on the scienter element as an ambiguity, which would then allow us to imply a constitutionally sufficient scienter requirement. *See, e.g., Al-Naseer*, 734 N.W.2d at 683 (implying a mens rea element for criminal vehicular homicide for leaving the scene of an accident); *State v. Oman*, 261 Minn. 10, 17, 110 N.W.2d 514, 520 (1961) (implying a scienter requirement in an obscenity statute). Thus, we are left with the question whether "reason to know" is clear and free of ambiguity, in which case we must enforce its plain meaning, or is ambiguous, in which case we may resort to the rules of construction. *See, e.g., Olmanson v. LeSueur County*, 693 N.W.2d 876, 879-80 (Minn. 2005) ("If a statute is ambiguous, the construction that avoids constitutional problems should be used, even if such a construction is less natural.").

Mauer argues that our decision in *State v. Grover*, 437 N.W.2d 60, 63 (Minn. 1989), established the plain meaning of similar words by interpreting the phrase "reason to believe" to create an objective standard of criminal negligence. As an initial matter, we observe that the words "reason to know" and "reason to believe," in ordinary usage, convey a range of meanings that could conceivably include everything from civil negligence to actual knowledge.[4]

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[4] A possessor of child pornography could be said to have "reason to know" under a civil negligence standard where he should be aware of a risk that the work involves .a minor. *See Grover*, 437 N.W.2d at 63 (comparing civil and criminal negligence). A possessor of child pornography could have "reason to know"

Second, we note that *Grover* was decided after the child pornography statute was first enacted in 1982, containing the "reason to know" standard. Finally, we do not read *Grover* to establish that the legislature's use of words "reason to believe" evidenced an intent to limit those words exclusively to an objective culpability standard, such as civil or criminal negligence. In other words, we read *Grover* to provide an inclusive, not an exclusive, interpretation of "reason to believe."

In *Grover* we rejected a vagueness argument by concluding that "reason to believe" was "sufficiently clear and definite to provide a standard for [the crime of failing to report child abuse]." 437 N.W.2d at 64. Because *Grover* did not involve a First Amendment concern, the child abuse reporting statute's terms could constitutionally include the whole range of culpability described by "reason to believe." In fact, the State in *Grover* was only required to prove culpability under the broadest interpretation of "reason to believe." Thus, culpability could include "culpability [that] is merely negligent rather than purposeful, knowing or reckless." *Id.* at

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under a criminal negligence standard where he should be aware of a substantial and unjustifiable risk that the work involves a minor, and his failure to recognize that risk involves a gross deviation from the standard of care. *See id.* A possessor of child pornography could have "reason to know" under a recklessness standard where he is subjectively aware of a substantial and unjustifiable risk that the work involves a minor. *See State v. Zupetz*, 322 N.W.2d 730, 733 (Minn. 1982). A possessor of child pornography could have "reason to know" under the court of appeals' standard, where he has knowledge of facts that subjectively lead him to believe that the work involves a minor. *Mauer*, 726 N.W.2d at 814. Finally,' a possessor of child pornography could have "reason to know" where he has actual knowledge that the performer is a child, because actual knowledge encompasses, and does not exclude, reason to know.

63. In other words, we were not required in *Grover* to resolve the ambiguity presented by the range of possible meanings of "reason to believe" because each of the possible meanings presented a sufficient basis for culpability.

Because the child pornography statute implicates the First Amendment requirement of scienter, the full range of mental states possible under the plain meaning of "reason to know" includes some that may not provide sufficient scienter. Accordingly, we are required to resolve the ambiguity presented by the range of possible meanings.

II.

Having concluded that the words "reason to know" are ambiguous when viewed in the context of the First Amendment requirement that child pornography laws contain a sufficient element of scienter, we now resort to the rules of statutory construction to determine the precise meaning of those words when used in the child pornography statute. The rules of construction permit a broad review of the purpose of and occasion for the statute and any legislative history.[5] Minn. Stat. § 645.16. Importantly, the rules also provide the presumption that "[t]he legislature does not intend to violate the constitution of the United States or of this state." Minn. Stat. § 645.17(3) (2006). Resorting to that presumption, we are bound to adopt an interpretation of "reason to know" that would avoid a constitutional conflict. *See Schumann v. Commissioner of Taxation*, 312 Minn. 477, 481-82, 253 N.W.2d 130, 132 (1977)

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[5] The available legislative history does not reveal a precise meaning intended by the use of "reason to know" in the child pornography statute.

("Where a statute is ambiguous, the construction that will avoid constitutional conflict is to be preferred, even though it is less natural.").

We observe that the legislature's stated purpose in enacting the child pornography statute is to penalize possession of pornographic work involving minors and to protect the children who are victimized by their involvement in the pornographic work. Minn. Stat. § 617.247, subd. 1 (2006). That declaration of purpose suggests that the legislature intended section 617.247, subd. 4(a), to extend the penalty to the full extent permitted under the First Amendment. Preserving the legislative intent to proscribe possession of child pornography as broadly as possible can be accomplished best by selecting from the range of meanings the lowest level of awareness permitted by the First Amendment. *Cf. State v. Cannady*, 727 N.W.2d 403, 408 (Minn. 2007) (severing a constitutionally defective affirmative defense but maintaining the rest of the child pornography statute in light of its stated purpose to penalize possession of child pornography and protect its child victims). Precisely what that minimum standard is remains unclear because the Supreme Court has avoided defining just how much or how little awareness of the content and character of an obscene work or a work of child pornography the First Amendment requires. *See Smith v. California*, 361 U.S. 147, 154 (1959); *Ginsberg v. New York*, 390 U.S. 629, 644-45 (1968).[6]

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[6] Mauer argues that the standard of scienter required by the First Amendment with respect to the age of a performer is actual knowledge, relying on the United States Supreme Court's decision in *X-Citement Video*, 513 U.S. at 73, 78. But that case did not address the minimum level of scienter required by the

The court of appeals applied the presumption that the legislature does not intend to enact laws that are unconstitutional and construed "reason to know" as follows:

> In light of * * * First Amendment concerns that apply to child pornography, we conclude that Minn. Stat. § 617.247, subd. 4(a), should be * * * interpreted to require that the possessor be "in some manner aware" that the performer is a minor. The "in some manner aware" standard is substantially similar, if not equivalent, to the recklessness standard approved in *Osborne*. In this context, a person has "reason to know" only if he has knowledge of facts that subjectively lead him to believe that the performer is a child.

Mauer, 726 N.W.2d at 814 (citation omitted). The court of appeals' application of the presumption in section 645.17(3) led it to adopt the "in some manner aware" construction of "reason to know" because that standard had survived a constitutional challenge in

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First Amendment for child pornography laws. The Court has repeatedly suggested that some level of scienter less than actual knowledge will satisfy the First Amendment. *See, e.g., Ferber*, 458 U.S. at 765 ("As with obscenity laws, criminal responsibility may not be imposed without *some element of scienter* on the part of the defendant." (emphasis added)); *X-Citement Video*, 513 U.S. at 78 ("[Obscenity and child pornography cases] suggest that a statute *completely bereft of a scienter requirement* as to the age of the performers would raise serious constitutional doubts." (emphasis added)). In fact, the Supreme Court has held that a state law criminalizing possession of child pornography with a mental state of recklessness "plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter." *Osborne v. Ohio*, 495 U.S. at 115.

Mishkin, 383 U.S. at 510-11, and *Ginsberg*, 390 U.S. at 643-44. *Mauer*, 726 N.W.2d at 814. We have also interpreted a statute banning the distribution of obscene material to penalize "only those who are in some manner aware of the character of the material they attempt to distribute," without further explanation of the precise awareness required by that standard. *Oman*, 261 Minn. at 17, 110 N.W.2d at 520.

The adoption of the court of appeals' narrowing construction of the "reason to know" language becomes more problematic in this case because it means that a possessor must have "knowledge of facts that subjectively lead him to believe that the performer is a child." *Mauer*, 726 N.W.2d at 814. Mauer argues that this construction renders the phrase "reason to know" superfluous and conflicts with the presumption that the legislature "intends an entire statute to be effective." Minn. Stat. § 645.17(2) (2006). For a person to "'know' requires only that the actor believes that the specified fact exists." Minn. Stat. § 609.02, subd. 9(2) (2006).[7] Mauer argues that the court of appeals' use of the "in some manner aware" standard ultimately equates "reason to know" with a possessor's subjective belief that a pornographic work uses a minor, and the term "knowing" must also be read to require a possessor's belief that the pornographic work uses a minor. Mauer argues that this construction would transform the disjunctive phrase "knowing *or* with reason to

[7] Though section 609.02, subd. 9 refers to crimes "in this chapter," its definitions apply to statutory crimes outside chapter 609 "[u]nless expressly stated otherwise, or the context otherwise requires." Minn. Stat. § 609.015, subd. 2 (2006). We can see no reason why either of these exceptions applies to the use of "knowing or with reason to know" in the child pornography statute.

know" into a single standard of subjective belief, contradicting not only the presumption that the legislature intends the entire statute to be effective but also the plain intent of the statute to specify separate mental states.

But we can avoid Mauer's argument that the court of appeals' narrowing construction renders the phrase "reason to know" superfluous if we determine that the lowest level of awareness permitted by the First Amendment is something less than the "in some manner aware" standard. We conclude that the recklessness standard represents the lowest level of scienter that has thus far been affirmatively approved by the Supreme Court under the First Amendment. Because the state does not propose a scienter standard less than recklessness, we will not attempt to fashion one for this case, but we recognize the possibility that the Supreme Court might, in some future case, approve a lesser standard and that, if the Court does so, it may have implications for the interpretation of Minnesota's child pornography statute.

The Supreme Court approved a recklessness standard in *Osborne v. Ohio*. 495 U.S. at 115. Ohio's legislature had defined recklessness as: "A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a *known risk* that such circumstances are likely to exist." Ohio Rev. Code Ann. § 2901.22(c) (LexisNexis 2006) (emphasis added). In *State v. Zupetz* we explained that "[a] person acts 'recklessly' when he *consciously* disregards a substantial and unjustifiable risk that the element of an offense exists." 322 N.W.2d 730, 733 (Minn. 1982) (emphasis added). We distinguished

between "recklessness" and "negligence," explaining that "[t]he reckless actor is *aware* of [a] risk and disregards it; the negligent actor is *not aware* of the risk but should have been aware of it." *Id.* at 733-34 (quoting 2 Charles E. Torcia, *Wharton's Criminal Law §* 168 at 272 (14th ed. 1979) (BB R5.2(e))). Our explanation of recklessness in *Zupetz* comports with the recklessness standard approved in *Osborne* against a scienter challenge.

Accordingly, we hold that, under Minn. Stat. § 617.247, subd. 4(a), a possessor of child pornography has "reason to know" that a pornographic work involves a minor where the possessor is subjectively aware of a "substantial and unjustifiable risk" that the work involves a minor. Our conclusion that "reason to know" in the child pornography statute requires a showing of recklessness satisfies the rule that we construe statutory language to avoid constitutional conflicts because it avoids the serious constitutional question of whether an objective mental state, such as civil or criminal negligence, would satisfy the scienter requirement. *See Schumann,* 312 Minn. at 481-82, 253 N.W.2d at 132; *see also* Egan, *supra,* at 1379. It also furthers the legislative purpose for the enactment of the child pornography statute by selecting the lowest level of scienter permitted by the First Amendment, as affirmatively approved by the Supreme Court. Finally, it designates a level of scienter that can be sufficiently differentiated from actual knowledge to satisfy the statutory presumption that the legislature intends the entire statute to be effective.

We feel obliged to emphasize that our announcement of the appropriate construction of the phrase "reason to know" in Minn. Stat. § 617.247,

subd. 4(a), does nothing to alter the manner by which knowledge of facts may be proved. We have long held that the proof of knowledge may be made by circumstantial evidence. *See AlNaseer,* 734 N.W.2d at 688 (citing *State v. Siirila,* 292 Minn. 1, 10, 193 N.W.2d 467, 473 (1971); *see also Oman,* 261 Minn. at 25-26, 110 N.W.2d at 525 (Gallagher, Frank T., J., concurring specially) (noting that, although knowledge must be proved to sustain a conviction, "the jury can find the existence of such knowledge from any relevant circumstances pointing to the probability that the defendant obtained knowledge* * *"). Proof of either actual knowledge or reason to know that a pornographic work involves a minor may also be made by circumstantial evidence.

III.

In light of our interpretation of the mental state required by the phrase "reason to know" in the child pornography statute, we must now consider what legal standard the district court applied to the facts in this case when it reached its conclusion. The district court made several findings of fact related to its ultimate conclusion that Mauer had reason to know the videos contained child pornography. For instance, the district court found:

> 16. In 1998, [Mauer] ordered two projects of "child erotica" from C.R.T.
>
> 17. The child erotica projects involved actual children, as opposed to people of majority age who looked young.
>
> 18. [Mauer] threw out the child erotica projects two weeks after receiving them when he watched them and realized the actors were in fact children.

> 19. [Mauer] admitted on cross-examination that the descriptions for the child erotica from 1998 and the descriptions for the material for which he is presently convicted were similar.
>
> * * * *
>
> 21. [Mauer] asserted a mistake of fact defense. The defense was premised on [Mauer's] statements that when he ordered the projects for which he is being prosecuted, he believed the actors would be of majority age, but would look young. Although mistake of fact is not prohibited by Minn. Stat. § 617.247, the Court found that the State has proven the nonexistence of this defense as a matter of fact beyond a reasonable doubt.
>
> 22. Therefore, the Court found that [Mauer] had reason to know that the actors in the present videos would be actual children.

Based on these findings, the district court concluded that, because Mauer had previously purchased child erotica from C.R.T., and that erotica involved minors, Mauer had reason to know that when C.R.T. advertises a project as involving children, the project does involve children.

It is possible that the district court determined Mauer had reason to know because, despite being unaware of a risk that the videos would involve children, a reasonable person under the circumstances should have known. It is also possible that the court determined that Mauer had reason to know because he was subjectively aware of a substantial and unjustifiable risk that the videos

would involve children. Because we cannot be certain that the district court's findings of fact and conclusions of law would support Mauer's conviction under our narrowing construction of "reason to know," we conclude that the district court is in the best position to review the record and reach a conclusion as to whether Mauer was subjectively aware of a substantial and unjustifiable risk that the videos he ordered from C.R.T. would involve minors. *See State v. Hipp*, 298 Minn. 81, 87, 213 N.W.2d 610, 614 (1973) ("[]:]f [a] law is found [to be overbroad or vague as applied to others], it may not be applied to [a defendant] either, until and unless a satisfactory limiting construction is placed on the statute." (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 620 (1971) (White, J., dissenting))); *In re Welfare of S.L.J.*, 263 N.W.2d 412, 419 n.5 (Minn. 1978) ("The Supreme Court, in fact, has encouraged state supreme courts to sustain the constitutionality of their offensive-speech statutes by construing them narrowly to punish only fighting words. Thus, * * it vacated and remanded for reconsideration [several cases]."). *See also Astleford Equipment Co. v. Navistar Int'l Transp. Co.*, 632' N.W.2d 182, 193 (Minn. 2001) (concluding that the district court was in the best position to determine applicability of newly articulated statutory standard).

Affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with this opinion.

STATE OF MINNESOTA
IN COURT OF APPEALS
A05-460

State of Minnesota,
Respondent,

vs.

Helmut Mauer,
Appellant.

Filed January 23, 2007
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 03038206

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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Michael McGlennen, 107 Second Street West, Chaska, MN 55318; and

William Gatton, 270 Grain Exchange North, 301 Fourth Avenue South, Minneapolis, MN 55415 (for appellant)

Considered and decided by Toussaint, Chief Judge; Lansing, Judge; and Kalitowski, Judge.

SYLLABUS

A statute that criminalizes the possession of

child pornography when the possessor has "reason to know" that the pornographic work uses a minor to depict actual or simulated sexual conduct requires that the possessor be in some manner aware that the performers are minors and, therefore, prescribes a scienter level sufficient to satisfy the requirements of the First Amendment.

OPINION

LANSING, Judge

A district court judge found Helmut Mauer guilty of possession of child pornography under Minn. Stat. § 617.247, subd. 4(a) (2002), which prohibits the possession of child pornography when the person in possession knows or has "reason to know" its content and character. In this appeal, Mauer argues that the statute is unconstitutional because it does not require actual knowledge that the persons depicted in the pornographic work are minors. We conclude that the statute meets the demands of the First Amendment as it pertains to possession of child pornography, and we affirm.

FACTS

The facts are undisputed. Following a court trial in 2004, the district court judge found that Helmut Mauer possessed compact discs with reason to know that they contained child pornography in violation of Minn. Stat. § 617.247, subd. 4(a) (2002). Mauer obtained the discs through a delivery service in a self-addressed envelope, purportedly sent by C.R.T., a Florida business. In reality, C.R.T. had been shut down following a government investigation. The return envelope had actually been sent by U.S. postal agents as part of a sting operation that grew out of the investigation. The postal agents sent promotional

materials and order forms to everyone on C.R.T.'s mailing list, which included Mauer. Mauer ordered four compact discs. The discs were described by the solicitation as containing images of girls between the ages of nine and fourteen engaged in sex acts. Mauer paid $515 in cash for the four discs. He also requested further information about a "write-your-own-script" option, which would allow him to order a videotape of a thirteen-year-old girl fulfilling his scripted fantasies.

Mauer personally signed for delivery of the compact discs. Shortly after delivery, a postal inspector, who had obtained a valid search warrant, seized the discs. Although Mauer initially denied that the images of individuals on the discs were children, he later contacted the postal inspector and, during the conversation, told the inspector that he knew the images on the discs were people who were underage. At trial he testified that he thought the children would be over eighteen years old but acknowledged that they could be as young as nine years old. The district court found Mauer guilty of three counts of possessing child pornography.

Following conviction, Mauer filed a notice of appeal and moved for a stay to pursue postconviction relief. Mauer then filed a postconviction petition challenging the constitutionality of Minn. Stat. § 617.247, subd. 4(a). In the petition, Mauer argued that the statute was unconstitutional because it did not require the state to prove that he knew the age of the persons depicted in the sexually explicit material, only that he had "reason to know." The district court denied Mauer's petition, and Mauer now appeals.

ISSUE

Does a statute that criminalizes the possession of child pornography contain a constitutionally sufficient level of scienter when it requires that the person in possession have "reason to know" that the pornographic work uses a minor to depict actual or simulated sexual conduct?

ANALYSIS

Questions of constitutional interpretation are issues of law that we review de novo. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). In Minnesota, statutes are generally presumed constitutional. *State v. Barker*, 705 N.W.2d 768, 771 (Minn. 2005). We will declare a statute unconstitutional "only when absolutely necessary." *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997) (quotation omitted). Because of the "unique protections" afforded by the First Amendment, however, the ordinary presumption of constitutionality does not apply to a statutory provision that 'restricts First Amendment rights. *State v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882, 885 (Minn. 1992); *see also Johnson v. State Civil Serv. Dep't*, 280 Minn. 61, 66, 157 N.W.2d 747, 751 (1968) (commenting on need for presumption of constitutionality to yield to preferred First Amendment rights). Instead, in the First Amendment context, the state must demonstrate a "compelling public need to protect a substantial public interest." *Johnson,*. 280 Minn. at 66, 157 N.W.2d at 751.

Child pornography, whether or not it is determined to be obscene, is unprotected by the First Amendment. *New York v. Ferber*, 458 U.S. 747, 764-65, 102 S. Ct. 3348, 3358 (1982). Because of the

compelling interest in protecting the physical and psychological well-being of minors, states are "entitled to greater leeway in the regulation of pornographic depictions of children." *Id.* at 756, 102 S. Ct. at 3354. States may thus punish not only distribution of child pornography but also possession. *Osborne v. Ohio,* 495 U.S. 103, 109-11, 110 S. Ct. 1691, 1695-97 (1990).

Nevertheless, all speech regulation must "avoid the hazard of self-censorship of constitutionally protected material." *Mishkin v. New York,* 383 U.S. 502, 511, 86 S. Ct. 958, 965 (1966). To protect free expression, criminal child-pornography laws must therefore include "some element of scienter on the part of the defendant." *Ferber,* 458 U.S. at 765, 102 S. Ct. at 3358 (citing *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215 (1959)). A child-pornography statute "completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts." *United States v. XCitement Video, Inc., 513* U.S. 64 78, 115 S. Ct. 464, 472 (1994). The U.S. Supreme Court has approved criminal child-pornography laws requiring knowledge or recklessness about the age of the performer. *See X-Citement Video,* 513 U.S. at 78, 115 S. Ct. at 472 (permitting conviction based on knowledge); *Osborne,* 495 U.S. at 115, 110 S. Ct. at 1699 (approving recklessness standard).

Scienter is a legal term that refers to the "degree of knowledge that makes a person legally responsible for the consequences of his or her own act or omission." *Black's Law Dictionary* 1373 (8th ed. 2004). Unquestionably, the Minnesota statute at issue requires *some* degree of culpability as it relates to the age of the performers. The statute prohibits

possessing depictions of minors involved in sexual conduct while "knowing or with reason to know its content and character." Minn. Stat. §§ 617.246, subd. 1(f), .247, subd. 4(a) (2002). The phrase "knowing or with reason to know its content or character" imposes accountability in some way for knowledge that the work is pornographic, which, in turn, relates to the age of the performers. *See* Mimi. Stat. § 617.246, subd. 1(f) (requiring that prohibited material involve minors). The question is whether the degree of culpability the statute requires is sufficient to guard against the risk of self-censorship.

Mauer argues that the statute's culpability requirement is constitutionally insufficient for a statute regulating child pornography. According to Mauer, the "reason to know" language creates a civil-negligence standard. Mauer's characterization of "reason to know" as a civil-negligence standard has support in the language of some Minnesota cases. *See State v. Grover,* 437 N.W.2d 60, 62-63 (Minn. 1989) (equating "reason to know" with criminal-negligence standard); *see also D.M.S. v. Barber,* 645 N.W.2d 383, 387 (Minn. 2002) (interpreting "reason to know" in Minn. Stat. § 541.073, subd. 2(a), to require objective, reasonable-person standard). As we interpret the statute, however, the requirement of "knowing or with reason to know" imposes a scienter requirement that is more demanding than a civil- or a criminal-negligence standard.

In the obscenity context, the U.S. Supreme Court has considered a statute that used a similar standard. In *Ginsberg v. New York,* a statute criminalized the knowing sale of obscene materials to minors and defined "knowingly" to include "reason to know" or "a belief or ground for belief which warrants

further inspection or inquiry." 390 U.S. 629, 88 S. Ct. 1274, 1283 (1968). The Court rejected a facial challenge to the statute, relying on the state court's interpretation of the statute as applying only to "those who are in some manner aware of the character of the material they attempt to distribute." *Id.* at 88 S. Ct. at 1283 (emphasis omitted) (quotation omitted).

The Court has approved of the "in some manner aware" standard in other cases as well. In *Mishkin* the Court concluded that the "in some manner aware" standard "amply serves" the goal of protecting against the risk of suppressing protected expression and "fully meets the demands of the Constitution." 383 U.S. at 511, 86 S. Ct. at 965. The Minnesota Supreme Court has similarly interpreted a state obscenity statute to include the "in some manner aware" standard. *State v. Oman*, 261 Minn. 10, 17, 110 N.W.2d 514, 520 (1961) (interpreting statute to punish only those "who are in some manner aware of the character of the material" they attempt to distribute).

In light of the similar First Amendment concerns that apply to child pornography, we conclude that Minn. Stat. § 617.247, subd.. 4(a), should be similarly interpreted to require that the possessor be "in some manner aware" that the performer is a minor. *See* Minn. Stat. § 645.17(3) (2006) (providing that legislature "does not intend to violate the constitution of the United States or of this state"). The "in some manner aware" standard is substantially similar, if not equivalent, to the recklessness standard approved in *Osborne*. In this context, a person has "reason to know" only if he has knowledge of facts that subjectively lead him to believe that the performer is a child. In addition, we have found no

indication, and Mauer has provided no evidence, that the legislature intended to impose liability using an objective, civil-negligence standard. *See* Minn. Stat. § 645.16 (2006) (providing that primary objective in statutory interpretation is to "ascertain and effectuate the intent of the legislature"). We therefore interpret "reason to know" as used in this particular statute to require a possessor to be "in some manner aware" that the performer is a child.

We recognize that *Mishkin* and *Ginsberg* are arguably distinguishable on two grounds. First, both cases involved obscenity, not child pornography. But this distinction favors the "in some manner aware" standard because the First Amendment provides *less,* not more, protection to child pornography than to obscenity. *See Ferber,* 458 U.S. at 756, 102 S. Ct. at 3354 (concluding that states have "greater leeway" in regulating child pornography). Second, these cases involve distribution, not possession. But the private possession of child pornography, unlike the possession of obscene materials, still causes harm to the children exploited. *See Osborne,* 496 U.S. at 108-11, 110 S. Ct. at 1696 (distinguishing *Stanley v. Georgia,* 394 U.S. 557, 89 S. Ct. 1243 (1969)).

It is also constitutionally significant that the definition of child pornography is less ambiguous than the definition of obscenity. Robert R. Strang, *"She Was Just Seventeen . . . and the Way She Looked Was Way Beyond [Her Years]: Child Pornography and Overbreadth,* 90 Colum. L. Rev. 1779, 1797 (1990); *see also Mishkin,* 383 U.S. at 511 (discussing "the ambiguities inherent in the definition of obscenity"). Because the legal definition of child pornography can be more readily applied than the definition of obscenity, possessors of child pornography can fairly

be held to the "in some manner aware" standard.

We are thus persuaded that, in this context, the possession of child pornography does not require any greater protection than the distribution of obscene materials. Hence, we conclude that *Mishkin* and *Ginsberg,* as well as *Osborne,* support the conclusion that the "in some manner aware" standard is sufficient to support a conviction for possession of child pornography.

Furthermore, as a policy matter; the state's compelling interest in the physical and emotional well-being of minors justifies the use of "in some manner aware" as the requisite level of scienter in Minn. Stat. § 617.247, subd. 4(a). In determining the appropriate level of scienter in child-pornography statutes, courts must balance First Amendment rights against the state's interest in protecting minors from sexual exploitation. Christina Egan, *Level of Scienter Required for Child Pornography Distributors: The Supreme Court's Interpretation of "Knowingly" in 18 USC. 2252,* 86 J. Crim. L. & Criminology 1341 1377-80 (1996). The Supreme Court has indicated that the state's interest in preventing the sexual exploitation of children is of "surpassing importance." *Ferber,* 458 U.S. at 757, 102 S. Ct. at 3355. Child pornography may thus be burdened in ways that other forms of protected speech closer to the core of the First Amendment may not. Richard Fallon, *Making Sense of Overbreadth,* 100 Yale L.J. 853, 894-96 (1991). -

The state's substantial interest in preventing the sexual exploitation of minors amply justifies the "in some manner aware" standard. The "in some manner aware" standard would deter the possession of child pornography without placing an

unconstitutional burden on protected expression. A "knowledge" standard, on the other hand, "places too high a burden on the government and is not-necessary under First Amendment doctrine." Egan, *supra*, 86 J. Crim. L. & Criminology at 1378. It would allow people in possession of child pornography to simply "close their eyes as to the age" of the performers. *United States v. Carter*, 854 F.2d 1102, 1109 (8th Cir. 1988) (rejecting lack-of-knowledge defenses in case involving use of children in distribution of controlled substance). Although a "knowledge" standard would adequately guard against the risk of self-censorship, it would defeat the goal of effectively regulating child pornography because it would protect willful blindness. The "in some manner aware" standard, in contrast, both protects against the risk of self-censorship and furthers the state's interest in combating child pornography. We therefore conclude that Minn. Stat. § 617.247, subd. 4(a), requires an adequate level of scienter and does not, on its face, violate the First Amendment.

Finally, we must decide-whether Mauer's conviction can be affirmed in light of our interpretation of the child pornography statute. We conclude that it can. Although our interpretation may be a narrowing construction, a statute as construed "may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendant[]." *Dombrowski v. Pfister*, 380 U.S. 479, 491 n.7, 85 S. Ct. 1116, 1123 n.7 (1965) (citations omitted). Under the circumstances, Mauer had fair warning that his conduct was criminal. The district court concluded that Mauer had "reason to know" that the performers were minors. Although the

district court did not use the words "in some manner aware," the district court made extensive findings of fact. Those findings demonstrate that Mauer undoubtedly was in some manner aware of the age of the performers. Mauer's conviction is therefore affirmed.

DECISION

Minn. Stat. § 617.247, subd. 4(a) (2002) requires a sufficient level of scienter as to the age of the performers to satisfy First Amendment requirements.

Affirmed.

s/
Harriet Lansing
January 17, 2007